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16 Attorneys for Defendants

17 KIM EMBRY and  
18 ENVIRONMENTAL HEALTH ADVOCATES, INC.

19 B&G FOODS NORTH AMERICA, INC.,

20 Plaintiff,

21 v.

22 KIM EMBRY and ENVIRONMENTAL  
23 HEALTH ADVOCATES, INC., acting as  
enforcement representatives under California  
24 Proposition 65 on behalf of the State of  
California,

25 Defendants.

26 CASE NO. 2:20-CV-00526-KJM-DB

27 **REPLY TO STATEMENT REGARDING  
28 ORAL ARGUMENT ON MOTION TO  
DISMISS PLAINTIFF'S SECOND  
AMENDED COMPLAINT**

**Hearing Date:** March 10, 2023

**Hearing Time:** 10:00 a.m.

**Courtroom:** 3 (15<sup>th</sup> Floor)

**District Judge:** Hon. Kimberly J. Mueller  
**Magistrate Judge:** Hon. Deborah Barnes

**Complaint Filed:** March 6, 2020

**FAC Filed:** July 7, 2022

**SAC Filed:** November 23, 2022

**Trial Date:** None Set

1       After the Motion to Dismiss was submitted, B&G improperly filed a “Statement Regarding  
2 Oral Argument” with four exhibits. The Court should strike the pleading, as it was submitted without  
3 leave. However, to the extent the Court considers this belated filing, it does not show that Defendants  
4 are state actors – if anything, it shows the opposite. Defendants respectfully request that if the Court  
5 takes B&G’s filing into account, the Court also consider this brief response.

6       B&G’s exhibits do not add anything. Most of them (Exhibits 1-3) show the rare occasion in  
7 which a Proposition 65 private enforcer and the Attorney General both maintain lawsuits with respect  
8 to the same chemical in the same or similar products against the same or similar defendants. Then,  
9 like any other civil matter where cases address the same subject, courts will relate or consolidate the  
10 actions. But both the private enforcers and the Attorney General are still taking independent actions  
11 and making independent litigation decisions.

12      The final exhibit (Exhibit 4) shows another rare occasion in which a private enforcer’s  
13 investigation efforts that lead to the Attorney General bringing a case will result in the private enforcer  
14 being compensated. Again, this is a result of independent actions and decisions.

15      Even if the Court found that prosecution of separate, parallel cases or compensation to a  
16 private enforcer in a case brought by the Attorney General made the private enforcers in those cases  
17 state actors, that would only highlight that Defendants here are not state actors. B&G has not pled –  
18 and cannot plead consistent with Rule 11 – that the Proposition 65 cases at issue fall into those  
19 categories. If anything, therefore, B&G’s belated filing shows that Defendants are not state actors.

20 *[See signature on following page.]*

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1 Respectfully submitted,

2 Dated: March 13, 2023

NICHOLAS & TOMASEVIC, LLP

3 By: /s/ Jake W. Schulte  
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